Public Prosecutor v Vellertore a/l Ponnusamy

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HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO 45–29 OF 2005
JEFFREY TAN J
7 APRIL 2010

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Criminal Law — Penal Code — s 300 — Murder — Conviction for — Circumstantial evidence — Whether accused committed act that caused death of deceased — Whether accused raised any reasonable doubt that another could have committed murders

C

Criminal Procedure — Witness — Impeachment proceedings — Material discrepancy between earlier statement to police and testimony in court — Whether court obliged to make immediate ruling on credit of witness — Whether immediate ruling would impair conduct of defence — Whether impeached — Effect of

D

Evidence — Witness — Credibility of — Assessment of — Contradictory statement by witness — Material discrepancy between earlier statement to police and testimony in court — Whether there was reasonable explanation for discrepancies — Effect of

E

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The accused, a security guard was charged with three counts of murder under s 302 of the Penal Code ('Code'). A postmortem of the three victims, who were his three children aged six, five and three ('the deceased'), revealed that the deceased were strangled to death. The accused's second wife, who was the mother of the three deceased, was in a welfare home at the time of the murders and only learned of the murders when she approached the Kulai Police Station for police assistance to take custody of the children. The only person present at the scene of the crime when the murders were committed was PW12, the accused's daughter from his first marriage, who cried for help when she realised that the three children had died. Her cries had summoned their neighbour to the scene of the crime. According to the neighbour, when he entered a room on the upper floor of the accused's house he had seen the accused hanging freely from the ceiling whereas the feet of PW12 were still on a chair. He had then immediately brought PW12 down by cutting the rope around her neck with a kitchen knife. The neighbour went on to say that although the accused was unconscious, he started breathing a few minutes later. The neighbour also testified that he found the three deceased lying motionless on the floor of the room from which he had rescued the accused and PW12. When the neighbour testified, PW12 was a co-accused but later the prosecution offered an

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A alternative charge under s 309 of the Code to PW12 to which she pleaded guilty to. Thereafter the trial continued with the accused as the sole accused. The psychiatrist who examined the accused testified that although the accused was suffering from depression brought on by the overwhelming stress of concern for his children and by the fact that his wife had left him he was not B mentally unsound and that he knew the consequences of his act. PW12 testified that after she had given the three children a bath, she had left the house to buy the accused a packet of cigarettes and to search for the accused's missing wife, who had left the house after the accused had hit her. She went on to say that when she returned the children were lying on the floor seemingly sleeping C and the accused was crying. Thereafter, according to PW12 the accused attempted to persuade her to attempt to commit suicide together with him. When the prosecution asked PW12 to relate the events that occurred before the attempted suicide she replied that she could not remember. The prosecution then applied for and obtained leave to proceed with impeachment proceedings D against PW12 after highlighting to the court that there was a material discrepancy between an earlier statement made by PW12 to the police and her testimony in court. In her earlier statement to the police, PW12 had provided a graphic account of what had happened to each of the deceased but in her E testimony in court she said that she did not know what happened to the three deceased. When asked to explain the major discrepancy between the earlier statement and her testimony in court, PW12 maintained that her testimony in court was the correct version and that she could not remember what she said in the said statement. Both parties then applied for an immediate ruling as to F whether PW12's credit was impeached. In his defence the accused testified that the children were already dead when he woke up at nine in the morning on the day of the murders, and that it was PW12 who had killed the children. He then went on to say that PW12, who had to mind the children in their mother's absence, had confessed to him that she had used a raffia string to strangle the G children but that she had no intention to kill them. It was then that the accused had seen the etchings on the door which read that the mother of the deceased was responsible for their deaths. Thus the defence story was that the accused found the children already dead at 9am, and that he had proceeded to hang himself in the adjoining room on the upper floor together with PW12 after H that. The sole issue to be determined in this case was whether it was the accused who committed the act that caused the death of the three deceased.

Held, convicting the accused of murder and sentencing him to death:

I (1) At the end of the impeachment exercise, the court was not obliged to make an immediate ruling on the credit of the witness. However, as an immediate ruling as to whether PW12's credit was impeached would not impair the conduct of the defence, it was held that there was no reasonable explanation for the discrepancy from PW12 and her credit

was accordingly impeached. With the credit of PW12 impeached, there was no direct account of the murders (see paras 15–16).

(2) From the evidence of the accused's neighbour, it was clear that the hanging incident of both the accused and PW12 must have taken place at around 3.30pm. Had it been any earlier, the accused could not have survived the hanging incident. Further, the unchallenged fact of the accused's employer that he had seen PW12 outside the house, which was the scene of the crime, at 10.20am on the day in question also supported this finding (see para 24).

(3) Although the case depended entirely on circumstantial evidence, the evidence in totality pointed to the fact that the accused was guilty as charged. The only person or persons who could have strangled the deceased were the accused and/or PW12. However, the accused was the only adult in the scene and as the adult he would have had control of the situation in the house. PW12 as a child of 14 would not have had the mental capacity or physical strength to have committed the murders. Further, as a reasonable father the accused would have been expected to vent his fury on PW12 after discovering that she had murdered the three deceased but the absence of injury on PW12 attested to the fact that she was not physically chastised by the accused. Instead the accused calmly proceeded to commit suicide, which was wholly inconsistent with the conduct of an aggrieved father. In addition the etchings on the door, which made up the suicide note, plainly showed that it was a case of murder-cum-suicide. Those etchings were intended to declare that the accused's wife was morally responsible for the deaths and the person who could lay blame at her door was the accused who had marital problems with her (see paras 26 & 45).

(4) The entire defence version of the hanging incident both as to time and place was implausible. The rest of the story of the accused also failed to stand up to scrutiny and the bare assertion that PW12 committed the murders was a recent invention. It was clear that only the accused had the motive to commit the murders, as explained in the etchings, and that only he could have done it (see paras 40–41).

[Bahasa Malaysia summary

Tertuduh, seorang pengawal keselamatan dituduh dengan tiga pertuduhan membunuh di bawah s 302 Kanun Keseksaan ('Kanun'). Bedah siasat ketiga-tiga mangsa, yang merupakan anak-anaknya berumur enam, lima dan tiga tahun (si mati), mendedahkan bahawa si mati dicekik sehingga mati. Isteri kedua tertuduh, yang merupakan ibu kepada ketiga-tiga si mati, berada di rumah kebajikan pada masa pembunuhan dan hanya mengetahui mengenai pembunuhan tersebut apabila dia pergi ke balai polis Kulai untuk bantuan polis untuk mengambil jagaan anak-anak tersebut. Satu-satunya orang yang

berada di tempat kejadian jenayah tersebut apabila pembunuhan dilakukan adalah PW12, anak perempuan tertuduh daripada perkahwinan pertamanya, yang menjerit meminta tolong apabila menyedari bahawa ketiga-tiga kanak-kanak itu telah mati. Jeritannya menyebabkan jiran-jirannya bergegas ke tempat kejadian jenayah tersebut. Menurut jiran tersebut, apabila dia memasuki bilik di tingkat atas rumah tertuduh dia melihat tertuduh tergantung bebas daripada siling manakala kaki PW12 masih di atas kerusi. Dia dengan segera membawa PW12 turun dengan memotong tali yang melilit lehernya dengan pisau dapur. Jiran tersebut selanjutnya menyatakan bahawa walaupun tertuduh tidak sedarkan diri, dia mula bernafas selang beberapa minit. Jiran itu juga memberikan keterangan bahawa dia mendapati ketiga-tiga si mati terbaring kaku di atas lantai bilik di mana dia menyelamatkan tertuduh dan PW12. Apabila jiran tersebut memberikan keterangan, PW12 adalah rakan sejenayah tetapi kemudian pihak pendakwaan menawarkan pertuduhan alternatif di bawah s 309 Kanun kepada PW12 yang terhadapnya dia mengaku salah. Kemudian perbicaraan diteruskan dengan tertuduh sebagai satu-satunya tertuduh. Pakar psikiatri yang memeriksa tertuduh memberikan keterangan bahawa walaupun tertuduh mengalami kemurungan (*depression*) akibat daripada tekanan (*stress*) yang keterlaluan kerana rasa bimbang terhadap anak-anaknya dan oleh fakta bahawa isterinya telah meninggalkannya, dia tidak hilang akal dan bahawa dia tahu mengenai akibat tindakannya. PW12 memberikan keterangan bahawa selepas dia memandikan ketiga-tiga orang anak tersebut, dia telah meninggalkan rumah tersebut untuk membelikan kepada tertuduh satu paket rokok dan untuk mencari isteri tertuduh yang hilang, yang telah meninggalkan rumah selepas tertuduh memukulnya. Dia seterusnya menyatakan bahawa apabila dia pulang kanak-kanak tersebut terbaring di atas lantai seolah-olah sedang tidur dan tertuduh sedang menangis. Kemudian, menurut PW12 tertuduh mencuba memujuknya untuk mencuba untuk membunuh diri bersama dengannya. Apabila pihak pendakwaan menanya PW12 untuk mengaitkan kejadian yang berlaku sebelum percubaan membunuh diri dia menjawab dia tidak dapat ingat. Pihak pendakwaan kemudian memohon dan memperoleh kebenaran untuk meneruskan dengan prosiding pencabaran (*impeachment*) terhadap PW12 selepas menunjukkan kepada mahkamah bahawa terdapat percanggahan yang material di antara kenyataan terdahulu yang diberikan oleh PW12 kepada polis dan keterangannya di mahkamah. Di dalam kenyataan sebelumnya kepada pihak polis, PW12 telah memberikan gambaran yang amat jelas mengenai apa yang berlaku kepada setiap si mati tetapi di dalam kenyataannya di mahkamah dia menyatakan dia tidak tahu apa yang berlaku kepada ketiga-tiga si mati. Apabila disuruh menjelaskan percanggahan di antara kenyataan awalnya dan keterangannya di mahkamah, PW12 kekal menyatakan bahawa keterangannya di mahkamah adalah versi yang sebenar dan dia tidak dapat mengingati apa yang dinyatakannya di dalam kenyataan tersebut. Kedua-dua pihak kemudian memohon untuk keputusan segera sama ada kredit PW12 telah dicabar. Di dalam pembelaannya tertuduh memberikan keterangan

bahawa anak-anaknya telah pun mati apabila dia bangun tidur pada pukul sembilan pagi pada hari pembunuhan tersebut dan ia adalah PW12 yang telah membunuh kanak-kanak tersebut. Dia seterusnya menyatakan bahawa PW12, yang terpaksa menjaga kanak-kanak tersebut semasa ketiadaan ibu mereka, telah mengaku kepadanya bahawa dia menggunakan tali rafia untuk menjerut kanak-kanak tersebut tetapi dia tidak mempunyai niat untuk membunuh mereka. Selepas itu barulah tertuduh ternampak goresan pada pintu yang menyatakan bahawa ibu si mati yang bertanggungjawab terhadap kematian mereka. Oleh demikian, hujah pihak pembelaan adalah bahawa tertuduh menemui kanak-kanak tersebut yang telah pun mati pada pukul 9 pagi, dan bahawa dia terus menggantung dirinya di bilik bersebelahan di tingkat atas bersama-sama dengan PW12 selepas itu. Satu-satunya isu untuk diputuskan di dalam kes ini adalah sama ada tertuduh yang telah melakukan tindakan yang menyebabkan kematian ketiga-tiga si mati.

Diputuskan, mensabitkan tertuduh dan menghukumnya dengan hukuman gantung sampai mati:

(1) Di akhir pelaksanaan pencabaran, mahkamah tidak bertanggungjawab untuk membuat keputusan segera mengenai kebolehpercayaan saksi. Walau bagaimanapun, oleh kerana keputusan segera sama ada kebolehpercayaan PW12 telah dicabar tidak akan menggugat kes pembelaan, diputuskan bahawa tidak ada penjelasan yang munasabah untuk percanggahan daripada PW12 dan kebolehpercayaannya oleh itu telah dicabar. Dengan kebolehpercayaan PW12 dicabar, tidak ada keterangan langsung pembunuhan tersebut (lihat perenggan 15–16, 24).

(2) Daripada keterangan jiran tertuduh, jelas bahawa insiden penggantungan kedua-dua tertuduh dan PW12 mungkin berlaku lebih kurang pukul 3.30 petang. Jika berlaku sebelumnya, tertuduh tidak mungkin terselamat daripada insiden penggantungan. Selanjutnya, fakta majikan tertuduh yang tidak dicabar bahawa dia melihat PW12 di luar rumahnya, yang merupakan tempat jenayah, pada pukul 10.20 pagi pada hari kejadian juga menyokong penemuan ini (lihat perenggan 24).

(3) Walaupun kes ini bergantung secara keseluruhannya kepada keterangan ikut keadaan, keterangan secara keseluruhannya mengarah kepada fakta bahawa tertuduh bersalah seperti yang dituduh. Satu-satunya orang atau orang-orang yang mungkin mencekik si mati adalah tertuduh dan/atau PW12. Walau bagaimanapun, tertuduh merupakan satu-satunya orang dewasa di tempat kejadian dan sebagai orang dewasa dia mempunyai kawalan terhadap situasi di dalam rumah tersebut. PW12 sebagai seorang kanak-kanak berumur 14 tahun tidak mungkin mempunyai kapasiti mental atau kekuatan fizikal untuk melakukan pembunuhan-pembunuhan tersebut. Selanjutnya, sebagai seorang bapa yang munasabah tertuduh sepatutnya diharap untuk meluahkan

keberangannya ke atas PW12 selepas mendapati bahawa dia telah membunuh ketiga-tiga si mati tetapi ketiadaan kecederaan pada PW12 membuktikan fakta bahawa PW12 tidak dipukul secara fizikal oleh tertuduh. Sebaliknya tertuduh secara tenang meneruskan untuk membunuh diri, yang secara keseluruhannya tidak konsisten dengan tindakan seorang bapa yang terkilan. Tambahan goresan pada pintu, yang membentuk nota bunuh diri, secara jelas menunjukkan bahawa ia adalah kes pembunuhan dan membunuh diri. Goresan tersebut diniatkan untuk mengisytiharkan bahawa isteri tertuduh bertanggungjawab secara moral terhadap kematian tersebut dan orang yang boleh meletakkan tuduhan pada pintu rumahnya adalah tertuduh yang mempunyai masalah perkahwinan dengannya (lihat perenggan 26 & 45).

(4) Keseluruhan versi pembelaan mengenai insiden penggantungan berkaitan masa dan tempat tidak dapat dipercayai. Baki cerita tertuduh juga gagal untuk mengatasi penelitian dan kenyataan kosong bahawa PW12 melakukan pembunuhan-pembunuhan tersebut adalah direka baru-baru ini. Adalah jelas bahawa tertuduh mempunyai motif untuk melakukan pembunuhan-pembunuhan tersebut, seperti yang diterangkan di dalam goresan tersebut, dan hanya dia yang boleh melakukannya (lihat perenggan 40–41).]

Notes

For cases on credibility of witness, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2750–2779.

For cases on s 300 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1474–1497.

For cases on witness in general, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5108–5113.

Cases referred to

Aik Ming (M) Sdn Bhd & ors v Chang Ching Chuen [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Browne v Dunn (1893] 6 R 67, HOL (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)

Hashim bin Mat Isa v PP [1950] MLJ 94, CA (refd)

Empress of Indian v Idu Beg (1881) ILR 3 All 776 (refd)

Juraimi bin Husin v PP [1998] 1 MLJ 537, CA (refd)

Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265, SC (refd)

Kishore Singh AIR 1977 SC 2267 (refd)

Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)

Lee Fah Sang v PP [1967] 2 MLJ 163, FC (refd)

Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Lim Heng Soon & Anor v PP [1970] 1 MLJ 166, FC (refd)
Mohamed Kunju v PP [1966] 1 MLJ 271, FC (refd)
Muthusamy v PP [1948] MLJ 57 (refd)
PP v Hanif Basree bin Abdul Rahman [2008] 3 MLJ 161, FC (refd)
PP v Mohd Amin Mohd Razali & Ors [2002] 5 MLJ 406; [2002] 5 CLJ 281, FC (refd)
PP v Rifkee Abu Bakar [2003] 8 CLJ 589, HC (refd)
PP v Zulkifli Arshad [2004] 2 CLJ 643, HC (refd)
R v Abbot [1955] 2 All ER 899 (refd)
Sainal Abidin bin Mading v PP [1999] 4 MLJ 497, CA (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)
Virsa Singh AIR 1958 SC 465 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to
Child Act 2001 s 91(e)
Criminal Procedure Code ss 180(1), 342
Evidence Act 1950 s 105
Penal Code ss 299, 300, 304, 309

Shahrizal bin Shaari (Attorney General's Chambers) for the prosecution.
Bernard George (Tay Bernard & Cheong) for the accused.

Jeffrey Tan J:

[1] This accused was tried for the murder of three of his children. The (amended) charges read:

> Bahawa kamu pada 20 November 2004 antara jam lebih kurang 10.30 pagi hingga 3.30 petang, di rumah No 681, Jalan Jambu Air 7, Taman Muhibbah, Saleng, Kulai, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Rudraa Kumar a/l Vellertore, 6 tahun, dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.
>
> Bahawa kamu pada 20 November 2004 antara jam lebih kurang 10.30 pagi hingga 3.30 petang, di rumah No 681, Jalan Jambu Air 7, Taman Muhibbah, Saleng, Kulai, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Kesappata a/p Vellertore, 5 tahun, dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.
>
> Bahawa kamu pada 20 November 2004 antara jam lebih kurang 10.30 pagi hingga 3.30 petang, di rumah No 681, Jalan Jambu Air 7, Taman Muhibbah, Saleng, Kulai, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Harini

A a/p Vellertore, 3 tahun, dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

B **[2]** All in all, the prosecution summoned 16 witnesses to prove those charges. To set the scene, it was the testimony of a government pathologist (Dr Shahidan bin Md Nor — PW4) that all three children ('children') were strangled to death, as indicated by the blood froth, the same features of congestion of the lungs, the petechiae on the face, and the blue fingertips of the children. 'Saya berpendapat, kerana tanda-tanda kematian menunjukkan C semua mereka mati disebabkan *asphyxia* yang boleh disebabkan oleh seutas tali.' It was the opinion of PW4 that the time of death was within 24 hours from the post mortem conducted at 10.30am on 21 November 2004.

D **[3]** But really, any account of the prosecution story should begin with PW7 (Vasudevan a/l Arumugam) who testified as follows. In November 2004, he lived at 680, Jalan Jambu Air 7, Taman Muhibbah, Saleng, Kulai. His immediate neighbour was the accused who was living with his four children. The wife of the accused was living in a welfare home. PW12 (who would testify E as PW12) was the daughter of the accused. At 3.30pm on 20 November 2004, whilst he was home, he heard the cries of PW12 from the house of the accused, crying for help. He immediately entered the house of the accused which was not locked. He entered a room on the upper floor. The accused and PW12 were hanging from the ceiling. The accused was hanging freely from the ceiling but F the feet of PW12 were still on a chair. He immediately brought PW12 down. 'PW12 terus menangis.' With a knife from the kitchen of the accused, he cut the rope round the neck of the accused. The accused fell to the ground. The accused was unconscious. A couple of minutes later, the accused started to breath. The children of the accused (PW7 identified them from photographs G P5) were lying on the floor, in the condition as in photograph P5(2). He asked PW12 as to what had happened to the children. PW12 replied 'bapak yang suruh bunuh'. PW12 said 'bapak pakai tali cekik dan PW12 pegang kaki kanak-kanak'. PW12 said that the children had died. He found that the children were not breathing. He proceeded to the police station to report the H matter. The accused and wife frequently quarrelled. The accused was a security guard.

[4] Under cross-examination, PW7 testified as follows. 'Saya ada di tingkat bawah rumah saya semasa dengar jeritan tolong, tolong' dalam satu minit I saya sudah sampai rumah OKT1'. There were two rooms on the upper floor of the house of the accused. He found the accused, PW12, and the children in the same room. PW12 was hanging by the chin, not by the neck. PW12 did not move when he brought her down. PW12 was not shouting when he entered the room.

[5] When PW7 testified, PW12 was a co-accused. But after a government chemist ('PW8') had testified, the prosecution offered an alternative charge to PW12 (see p 45 of the notes of proceedings and exh P22) who promptly pleaded guilty thereto, to an offence punishable under s 309 of the Penal Code. PW12 was dealt with under s 91(e) of the Child Act 2001. Thereafter, the trial continued with the accused as the sole accused.

[6] The prosecution adduced evidence that the accused was examined at Hospital Permai, pursuant to order of court made under s 342 of the Criminal Procedure Code. A government psychiatrist (Dr Nor'Izam bte Md Alias — 'PW9') testified as follows. On 1 December 2004, he examined the accused at Hospital Permai. The accused was quiet. The accused did not want to talk. The accused only responded after he had been asked repeatedly. The accused only responded to questions that had nothing to do with the death of the children. The accused admitted that he tried to hang himself. The accused was not mentally unsound. Depression could lead to suicidal tendencies.

[7] Under cross-examination, PW9 said that depression could cause a man to kill his children and to commit suicide, but that a person suffering from depression would know the consequences of his act. PW9 agreed that the accused would have been depressed by 'overwhelming stress of concern for his children and by the fact that his wife had left him', and that the accused could have 'deeply believed that the killing of his children was the right thing to do' (see 57NP). PW9 disagreed that the accused had a twisted mind that bordered on temporary insanity. PW9 agreed that it could have been that the accused would not relate the events surrounding the death of his children because he felt he had nothing to live for. PW9 disagreed that the accused was under any affective psychotic disorder. PW9 agreed that, the accused was in a depressive state on 1 December 2004. Under re-examination, PW9 said that the accused, who was under observation from 1 December 2004 to 15 March 2005, exhibited no signs of any mental disorder.

[8] PW11 (Krishnama a/p Thavasoo) testified as follows. She was the mother of the children. She married the accused in 1996. PW12 was the daughter of the accused from an earlier marriage. 'Lepas kahwin saya tidak gembira.' In October 2004, the family moved to Johor Bahru. In early November 2004, the family moved into house 681, she frequently quarrelled with the accused. On 7 November 2004, the accused hit her. She ran to a welfare home. When she left house 681, she did not know where to go. For that reason, she did not take the children along with her. On 20 November 2004, she was still at the same welfare home. At 6pm on 20 November 2004, she approached the Kulai Police Station for police assistance to take custody of the children. Instead, she was

informed that the children had passed away. On 21 November 2004, she saw her children at the mortuary. She stayed at the welfare home from 7 November 2004 to 23 November 2004.

[9] Under cross-examination, PW11 related as follows. Her marital problems with the accused started from the word go. Her marital problems did not stem from PW12. She had not mistreated Rudraa Kumar or PW12. The accused loved the children. The etchings on the door (see photograph P5(12)) stated 'sebab kematian adalah Krishnama'. Those etchings, which were in Tamil, were not made by her.

[10] The testimony of PW12 who was 16 when she testified, could be summarised as follows. The accused was her father. Her mother, Ramaya a/p Kalimuthu, died when she was four or five. The accused married PW11 when she was seven. She lived with the accused and PW11. The children were the off-spring of the accused with PW11. In early November 2004, the family moved into house 681. In house 681, the accused and PW11 frequently quarrelled. On 7 November 2004, PW11 left house 681 after a quarrel. The accused searched but failed to find PW11. At 10.30am on 20 November 2004, after she had given a bath to the children, the accused asked her to buy cigarettes and to search for PW11. She bought the cigarettes, searched unsuccessfully for PW11, and returned to house 681 at about 12 noon. She found the accused crying. The accused was incoherent. The accused asked her to die together with him. The children were lying on the floor, seemingly sleeping. The accused attempted to commit suicide.

[11] At that stage, learned DPP asked PW12 to relate the events before the attempted suicide. PW12 said that she could not remember. Learned DPP then produced the statement (later marked as P24) that PW12 had allegedly given to the police on 20 November 2004 at 6pm.

[12] PW12 resumed her testimony as follows. 'Selepas beli rokok dan cuba cari PW11, saya balik rumah. Saya nampak OKT dan tiga adik beradik saya. Saya nampak OKT sedang menangis. OKT cakap 'mari kita mati'. Semasa itu adik-adik masih ada dalam bilik, sedang tidur. Kemudian OKT menyuruh saya mati bersama dia kerana adik-adik saya telah meninggal dunia.' She had no idea as to what had happened to the children. When she was back at house 681, the children were already dead.

[13] Learned DPP then intimated that there could be an application to impeach the credit of PW12.

[14] The next day, PW12 testified as follows. When she was back at house 681, the accused informed her that the children had died. She did not ask why

the children had died. There was froth (*air liur*) on the mouth of Kesaprata. When she saw that the children had passed away, she cried. The accused asked her to die together with him. She and accused then proceeded, with rope in the case of the accused and cloth in her case, to hang themselves from the fan hook. She and the accused stood on a chair. The accused kicked away the chair. 'Saya pun rasa macam mahu pengsan, dan saya jerit untuk minta bantuan.' PW7 rescued her. PW7 cut the rope of the accused. She could not recall the events of 18 November 2004. She could not remember what she said in her statement to the police.

[15] Learned DPP then applied to impeach the credit of PW12. The alleged statement was examined. A major discrepancy that was material to the issue was found between what PW12 said in court and what PW12 allegedly said (see portions underlined in red) in the statement. PW12's testimony in court was that she did not know what had happened to the children. But in the alleged statement of PW12, there was a graphic account of what had happened to each of the children. It was not a case of a mere omission (see *Muthusamy v Public Prosecutor* [1948] MLJ 57). Leave was given to the prosecution to proceed with impeachment proceedings. In the event, PW12 denied she gave that statement to the police, and said she could not remember whether she gave that statement. It fell upon the prosecution to prove that statement. Through ASP Kavitha a/p Nadarajah ('PW14'), it was proved that PW12 gave that statement to the police on 20 November 2004. PW12 was informed that there was the aforesaid major discrepancy between what she said in court and what she said in her statement (see 113NP). PW12 was asked to give an explanation for that discrepancy. PW12 maintained that her testimony in court was the correct version, and that she could not remember what she said in her statement. 'Saya tidak ada penjelasan lain' (see 114NP). Both parties applied for an immediate ruling (see 114NP). In *Public Prosecutor v Rifkee Abu Bakar* [2003] 8 CLJ 589 it was held:

> But a court is not obliged, at the close of an impeachment exercise, to make an immediate ruling on the matter (see *Somwang Phattanasaeang v Public Prosecutor* [1992] 1 SLR 850; *Kwang Boon Keong Peter v Public Prosecutor* [1998] 2 SLR 592). Indeed, it was held by the Federal Court per Eusoffe Abdoolcader FJ, in *Dato Mokhtar Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, that a witness's credit 'stands to be assessed as a whole together with the rest of the evidence at the appropriate stage, that is to say, at the close for the case for the prosecution or for the defence, as the case may be. No immediate order of a summary nature can or should be made … and the right of cross-examination or re-examination according to the circumstances should not be denied as it might well be that in the exercise of such right his credit might be repaired, restored or re-established', and it was held by the Singapore Court of Appeal, in *Syed Abdul Aziz & Anor v Public Prosecutor* [1993] 3 SLR 534, that *Muthusamy v Public Prosecutor* does not support any proposition that the court is obliged, at the end of the impeachment exercise, to make an immediate ruling on the credit of the witness. Nonetheless, in *Syed Abdul Aziz & Anor v Public*

Prosecutor, the Singapore Court of Appeal accepted that 'there can of course be cases where a court confronted with a materially inconsistent previous statement made by a witness is prepared at that stage to indicate that the witness is not worthy of credit', and also more or less agreed that in such cases the court is obliged to make an immediate ruling. The case of *Yusof bin A Samad v Public Prosecutor* [2000] 4 SLR 58 is further, *albeit* persuasive, authority that the court may make an immediate ruling. And it would appear that an immediate ruling serves better the ends of justice. In the first place, without an immediate ruling, both prosecution and defence would be only left in a cleft stick. And in the second place, if the ruling is made at the close of the case for the prosecution or defence, as the case may be, it would be too late for the prosecution or defence, as the case may be, to repair, restore or re-establish, even if it could, the credit of the witness at the close of the case 'for the prosecution or defence, when the case at that stage would have closed. On the other hand, an immediate ruling, even if impeaching the credit of the witness, would still leave a window to the prosecution or defence, as the case may be, to repair, restore or re-establish the credit of the witness. In any event, an immediate ruling on the credit of the accused would not impair the conduct of the defence, and the court in the making of an immediate ruling could only err, only on the side of the defence'.

[16] An immediate ruling would not impair the conduct of the defence. It was then held that there was no reasonable explanation for the discrepancy from PW12, whose credit was accordingly impeached. Thereupon, learned DPP ended her examination of PW12, and the defence had no interest to cross-examine PW12 (see 114 & 115NP).

[17] The charge was murder, as ascribed in ss 299 and 300 of the Penal Code. Section 299 of the Penal Code provided that 'Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide'. 'Under the category of culpable homicides fall both cases of culpable homicide amounting to murder and those not amounting to murder' (*Ratanlal & Dhirajlal's Law of Crimes* (25th Ed p 1296)). 'Culpable homicide is murder (a) if the act by which the death is caused is done with the intention of causing death; (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (c) if it is done with the intention of causing such bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid' (s 300 of the Penal Code). 'Where there is an intention to kill, the offence is always murder … The offence is murder, if the offender knows that the particular person injured is likely, either from peculiarity of construction or

immature age, or other special circumstances to be killed by an injury which would not ordinarily cause death … The offence is culpable homicide, if the bodily injury intended to be inflicted is likely to cause death; it is murder if the injury is sufficient in the ordinary course of nature to cause death … it is culpable homicide if the act by which death is caused is done with the knowledge is that the act is likely to cause death but murder if it done with the knowledge that death is the probable result' (paraphrased from *Ratanlal & Dhirajlal* pp 1292–1294). Putting it shortly, all acts of killing done with the intention to kill, or to inflict bodily injury likely to cause death, or with the knowledge that death must be the probable result, are prima facie murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder (per Straight J, in *Empress of Indian v Idu Beg* (1881) ILR 3 All 776 and quoted in *Ratanlal & Dhirajlal* p 1296). 'A bare killing, without proof of intention or knowledge as required by that section, can never be murder. It is not sufficient for the prosecution to prove merely the killing, without proving intention or knowledge as required by that section set out in that definition …' (*Hashim bin Mat Isa v Public Prosecutor* [1950] MLJ 94 per Willan CJ). 'The prosecution must … bring the case under any of the four clauses of s 300, to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any of the four clauses of s 300 … the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under s 299 (*Kishore Singh* AIR 1977 SC 2267, and quoted in *Ratanlal & Dhirajlal* p 1296). Yet culpable homicide, even if within cll (a) to (d), is not murder, when it is brought within one of the 5 exceptions to s 300. 'The correct approach to the application of (ss 299 and 300) is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 Penal Code apply, and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in s 300 of the Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s 300 of the Penal Code must necessarily fall within s 299, but all cases within s 299 do not necessarily fall within s 300 (*Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 per Raja Azlan Shah FJ, as HRH then was).

[18] But it is difficult if not impossible to procure direct evidence to prove the intention of an individual (*Lee Fah Sang v Public Prosecutor* [1967] 2 MLJ 163; *Lim Heng Soon & Anor v Public Prosecutor* [1970] 1 MLJ 166; *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84; *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265). Hence 'intention is a matter of inference' (*Tham Kai Yau & Ors v Public Prosecutor* at p 176, per Raja Azlan Shah FL, as HRH then was). 'A man's intention is a question of fact and it can be gathered from his acts' (*Ratanlal & Dhirajlal* p 1296). Intention can be

inferred from the act or conduct or other relevant circumstances of the case (*Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537). Intention to kill can be inferred from the nature of the injuries sustained by the deceased (*Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497). 'Intention must be inferred not merely from the natural consequences of his act, but from the act itself, and as the natural consequence of an act of the kind in question would be death' (*Ratanlal & Dhirajlal* p 1304). 'If there is no intention to kill, then it can be murder only if (i) the accused knew that the injury inflicted would be likely to cause death, or (ii) that it would be sufficient in the ordinary course of nature to cause death, or (iii) that the accused knew that the act must in all probability cause death. If the case cannot be placed as high as that and the act is only likely to cause death and there is no special knowledge, the offence comes under s 304 (Part II) of the Indian Penal Code' (*Ratanlal & Dhirajlal* p 1302).

[19] In *Rajwant Singh* AIR Supreme Court stated:

> The third clause of s 300 discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature, the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not.

[20] Vivian Bose J, in the leading case of *Virsa Singh* AIR 1958 SC 465, further explained cl 3 of s 300 as follows:

> To put it shortly, the prosecution must prove the following facts before it can bring a case under s 300 'thirdly'.
>
> First, it must establish, quite objectively that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved; These are purely objective investigations;
>
> Thirdly, it must be proved that there was an intention to inflict the particular bodily injury, that is to say that it was not accidental or intentional, or that some other kind of injury was intended;
>
> Once these three elements are proved to be present, the enquiry proceeds further and
>
> Fourthly, it must be proved that the injury of the type just described (and, of course, the burden is on the prosecution throughout) the offence is murder under section 300 'thirdly'. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that

an act of the kind will be likely to cause death. Once the intention to cause bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.

[21] *Ratanlal & Dhirajlal* pp 1310–1313 further stated as follows:

This clause [3] states that where bodily injuries intended to be inflicted are sufficient in the ordinary course of nature to cause death the offence falls under this clause. The distinction between this clause [3] and clause (2) of section 299 depends upon the degree of probability of death from the act committed. If from the intentional act of injury committed the probability of death resulting is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death and the conviction should be of murder; if there was probability in a less degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury likely to cause death and the conviction should be culpable homicide not amounting to murder. It is not correct to say that an injury sufficient in the ordinary course of nature to cause death is an injury, which inevitably and in all circumstances must cause death. If the probability is very great, the requirements of this clause are satisfied, and the fact that the particular individual may by the fortunate accident of his having secured specially skilled treatment, or being in possession of a particularly strong constitution has survived an injury which could prove fatal to the majority of persons subjected to it, is not enough to prove that such an injury is not sufficient in the ordinary course of nature to cause death. If a person knowingly causes injuries which are more likely to cause death that not in the ordinary way, his offence falls under either the second or third clause …

When there are several injuries, and even if none of the injuries is sufficient in the ordinary course of nature to cause death of the deceased but cumulatively they are sufficient to cause death, the offence will be murder and not culpable homicide not amounting to murder. In the case of some classes of injuries, it is easy to say what was intended; for instance, in a wound with a knife in the abdomen. A man who inflicts such a wound intends to inflict a wound which he must know will be dangerous to life … A judge must always find whether the bodily injury inflicted was that which was intended by the accused. The nature of the offence does not depend merely on the location of the injury caused by the accused. The intention of the person causing the injury must be gathered from a careful examination of all the facts and circumstances of each given case …

The emphasis in the clause is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death, in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant... The nature of the material object used and the force used as useful guides in arriving at a decision as to whether the intention and knowledge required by the section can be attributed to the accused …

... Each case would depend on its own facts and circumstances …

A

> ... Where there was no premeditation, and in the course of a sudden quarrel on a trivial issue, a young man, had given only one blow to the deceased, section 300 firstly and thirdly were not attracted and his conviction under section 302 was altered to section 304, Part II, as he could be imputed with the knowledge that he was likely to cause an injury which was likely to cause death.

B

> ... Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention.

C

[22] The existence of circumstances described in any of the five exceptions excuses an act which would otherwise be murder, to the extent that the act constitutes only culpable homicide not amounting to murder and murder. But in view of s 105 of the Evidence Act 1950 (see *Mohamed Kunju v Public Prosecutor* [1966] 1 MLJ 271 where it was held by the Privy Council that the

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burden of proving exception 4 rests upon the accused), 'the prosecution is not obliged to prove the absence of facts which might bring the case within a special exception of s 300 of the Code, which the accused might set up in his defence. The accused is not also compelled to lead evidence to satisfy the court that the case was brought within (the exceptions). All that may be necessary for the

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accused is to offer some explanation of the prosecution evidence, and if this appears to be reasonable, even though not beyond doubt, and to be consistent with the innocence of the accused, he should be given the benefit of it' (*Ratanlal & Dhirajlal* at p 1326).

F

[23] In the instant case, there was no doubt that the offence was murder as ascribed in ss 299 and 300 of the Penal Code. The children were strangled, which act left no doubt that the intention must have been to kill. Given the instant facts and the applicable law, the sole issue was whether it was the accused who committed the act that caused the death of the children.

G

[24] With the credit of PW12 impeached, there was no direct account of the incident. The testimony of PW12 was a complete nought. Still, this much was certain. At about 3.30pm, PW7 heard the cries of PW12. Within the next minute, PW7 had reached the house of the accused. The point in time when

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PW7 heard the cries of PW12 was the exact time when PW12 attempted suicide. The point in time when the rope first yanked on the neck of the accused must also have been around that time. The accused was not breathing when he was cut loose from the ceiling. The hanging incident of both accused and PW12 must have been around 3.30pm. Had it been any earlier, the

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accused could not have survived the hanging incident. The unchallenged fact that PW10 (the manager of the security firm that the accused worked for) found PW12 outside house 681 at 10.20am. On 20 November 2004 (see 68NP) supported that finding. The children were strangled to death. The marks around their necks made that out. And they would have been strangled

before the hanging incident, for the children were motionless when PW7 entered the room where the accused and PW12 were hanging from the ceiling.

[25] PW12 admitted to the charge that she attempted suicide. Had the accused also not attempted suicide? But if the accused had not attempted suicide, then the hanging incident was involuntary in the case of the accused. Except that there was no evidence to suggest that the hanging incident could have been involuntary in the case of the accused. It would have required a lot of muscle to hoist the accused up to the ceiling to hang him. PW12 could not have had the physical attributes to have done so. Anyone else who could have done so would have been seen by PW7 who was there at the scene at about the exact time as the hanging incident. But there was no evidence from PW7 that there was another person in the house. Further, there was no evidence that the accused was bound, which would have to be the case if the accused were to be forcibly hanged, or else the accused would surely offer stiff resistance and put up a hell of a fight. It would not pan out that the accused could have been hanged against his will. All facts and circumstances pointed that the accused attempted suicide.

[26] The accused attempted suicide after the children had been strangled. As said, there was no evidence from PW7 that there was another person in the house at the material time. The only person or persons who could have strangled the children was/were the accused and or PW12. The accused was the only adult in the house. As the only adult around, the accused had, or must have had, the control of the situation in the house. Could it therefore have been possible for PW12 to have single-handedly strangled all three children? In the first place, it would not seem that PW12, who was then a child of 14, could have had the mental capacity and nerve and or physical strength to execute the dastardly deed. And if PW12 had executed the dastardly deed, would that have been reason for the accused to commit suicide? There could have been reason for the accused to vent his fury at PW12 and or take the matter to the law. Reasonably, that would have been the action of a father who discovered that his children had been killed. But it was none of that. The absence of injury on PW12 attested that she was not physically chastised. The accused had also not taken the recourse of the law. Instead, the accused calmly proceeded, so it must seem from what was a voluntary act, to commit suicide, which was wholly inconsistent with the conduct of an aggrieved father. PW12 would not or could not testify on the incident. Consequently, the case depended entirely on circumstantial evidence. But all available evidence pointed that the accused could not have been uninvolved in the deaths of the children. It was clear that the death of the children had to do with the accused and his marital problems. One telling bit of evidence, those etchings on the door of the room where PW7 found the accused, PW12 and children, plainly said that it was a case of murder-cum-suicide. It was the unchallenged evidence of PW11 that those

etchings stated 'sebab kematian adalah Krishnama'. It was also the unchallenged evidence of the investigation officer (ASP Shatheesh Menon — PW13) who could read Tamil that those etchings read 'sebab kematian kami adalah Krishnama'. Those etchings made up the suicide note. Now those etchings would not have stated 'sebab kematian kami adalah Krishnama' if PW12 had been instrumental in the deaths of the children. It was established that PW11 had not stepped inside the house from 7 November 2004 to 20 November 2004. Hence, those etchings could not have intended to identify PW11 as the killer. Rather, those etchings could only have been intended to declare to all at large that PW11 was morally responsible for the death of the accused, PW12, and the children. And the only person who would do that, lay blame at the door of PW11, could only be the accused who had serious marital problems with PW11 who had left the house. The facts were unlike the case of *R v Abbot* [1955] 2 All ER 899. On the facts, there was no likelihood that PW12 could have been the perpetrator. The whole incident could only been orchestrated and executed by an adult. There was no likelihood that a third party could have been the perpetrator (see *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2008] 3 MLJ 161 para 34). 'When you eliminate the impossible, whatever remains … must be the truth.' — Sir Arthur Conan Doyle. Only the accused could have been the perpetrator.

[27] Section 180(1) of the Criminal Procedure Code provided that 'when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused'. Sub-section (4) provided that 'for the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction'. The testimony of PW12 was totally discarded. What PW12 said to PW7 was also disregarded. But yet all examination of the extant showed that there was sufficient evidence to convict should the accused remain silent. The accused was ordered to enter upon his defence.

[28] In his defence, the accused testified that the children were already dead when he woke up at 9am on 20 November 2004, and that it was PW12 who killed the children (see 132NP). His full testimony, much of which would be quoted verbatim, so as to ensure that nothing would be lost in translation, was as follows. His first marriage was in 1987. PW12 was his daughter from that marriage. His first wife died in 1994, when PW12 was 4. PW11 was his second wife, with whom he had the children. The children were looked after by PW11 and PW12. He loved his children. PW11 constantly deserted the matrimonial home. He moved his family from Kelang to Johor where he worked as a security guard. In Johor, PW11 also deserted the matrimonial home. 'Krishnama melarikan diri sebab saya pernah pukul dia' (see 127NP). 'Saya memukul sebab Krishnama memukul PW12 dan Rudraa Kumar … dengan penyapu buluh'

(see 128NP). '(PW11) pernah seksa PW12 dengan sudu yang panas, dua kali … anak-anak lain dipukul sahaja, tidak di seksa' (see 128NP). PW12 was close to the children. But PW12 would beat the children, 'mengetuk kepala dan tumbuk badan adik-adik bahagian belakang', if PW11 had beaten her. PW12 was angry that PW11 was constantly away. He was not happy that the children were beaten. He would not hit his children. He counselled PW12 not to beat the children. PW12 asked why was it then that PW11 could hit her. PW12 complained that PW11 treated her less favourably. In Johor, 'ada masalah Krishnama memukul PW12 dan Rudraa Kumar dengan penyapu'. PW11 lived in house 681 for five days. 'Selepas Krishnama keluar dari rumah itu, PW12 yang jaga anak- anak. Saya tidak masuk PW12 ke sekolah sebab dia yang jaga anak-anak … PW12 yang memberi makan dan mandikan adik-adik' (see 130NP). On the morning of 19 November 2004, PW12 told him that PW11 came to house 681 on 18 November 2004, and that PW11 beat her (PW12) when she (PW12) stopped PW11 from taking away her clothes. He saw 'kecederaan PW12 pada bahu bahagian kiri'. On 19 November 2004, he lodged a police report that PW11 assaulted PW12. On 19 November 2004, PW12 did not beat the children. On 19 November 2004, he was at work from 7pm to 12 midnight. He returned home at 2am on 20 November 2004. After his bath, he woke up all four children 'untuk memberi makanan mee dan buah-buah. Lepas makan, anak tidur, dan saya tidur di bilik berlainan. Saya bangun dari tidur pada 9 pagi. Saya masuk ke bilik anak-anak dan nampak tiga orang anak telah meninggal. Saya ada juga nampak buih di mulut Harini. PW12 peluk kaki sambil menangis dan memberitahu saya dia yang buat' (see 132NP). PW12 told him that she used a raffia string to kill the children, 'kerana Krishnama'. PW12 said she had no intention to kill the children. He pulled PW12 out of the room. Then he saw the etchings on the door. He asked what were they and who had made them. 'Saya diberitahu tulisan adalah nama Krishnama dan nombor telefon Krishnama dan juga ayat bermaksud 'Krishnama adalah punca kematian kami semua'. Saya tanyakan PW12 mengapa dia buat begitu. PW12 jawab sebab Krishnama hanya jaga anak-anak sendiri, tidak menjaga beliau. Kemudian saya beritahu PW12 saya sedia mati kerana perbuatan PW12.'

[29] To the question by learned counsel 'Kamu kata kamu sedia mati kerana perbuatan PW12, apakah maksud itu', the accused answered 'maksud saya kerana PW12 membunuh ketiga-tiga anak saya, saya tidak mahu menyerahkan Ravathy kepada pihak polis, sebab itu saya kata begitu' (see 134NP). 'Keadaan PW12 semasa memberitahu kejadian tersebut, nampak takut dan tangan beliau gigil, tidak boleh duduk dan demam. Lepas itu saya bawa PW12 ke bilik mayat dan memegang kaki tiga anak saya, dan saya menangis. Kemudian saya cium kaki anak-anak saya. Saya minta PW12 duduk sebelah pintu. Lepas itu saya kata kepada PW12 bahawa PW12 tidak boleh nampak saya lagi,

bermakna saya akan mati. Lepas itu saya mencium PW12 dan minty PW12 duduk dalam bilik itu, dan juga minta PW12 jangan keluar dari bilik itu' (see 134–135NP).

[30] The accused then thus related how he hung himself, not in the room where the children were lying, but in another room. He cut a length of clothesline and took it to that other room. He entered the room where the children were lying. PW12 was inside that room. He again kissed the feet of the children. He instructed PW12 not to leave that room. With the clothesline, he entered the other room. He could not find a chair. He secured a chair from the kitchen. He tried to hang himself in that other room. The clothesline was too short. He secured a table. He placed the chair on top of the table. 'Lepas itu saya memegang tali tersebut dan menangis. Saya ikat tali itu pada *hook* kipas, iaitu dalam bilik saya, bukan bilik yang mana anak terbaring' (see 136NP). He tied the clothesline round his neck. He kicked away the chair. PW12 entered that other room. 'Lepas itu tali saya sangkut leher saya. Saya nampak imej PW12. Saya ingat tali sangkut leher saya, dan pada masa itu PW12 pegang kaki saya. Saya tidak tahu apa yang berlaku selepas itu. Saya sedar diri empat hari kemudian, di wad hospital' (see 137NP). 'Tali dalam P5(8) … Nampak saya serupa seperti tali yang guna gantung diri' (see 138NP).

[31] The accused then related that in May 2006 he received a letter from PW12. 'Dalam surat PW12, PW12 meminta maaf. PW12 hantar surat selepas dilepaskan dengan ikat jamin. Inilah surat yang saya terima daripada PW12. Dalam surat, PW12 mengatakan PW12 berdoa supaya bapak dapat dilepaskan. PW12 juga mengatakan jangan menangis ingatkan perkara yang sudah lepas. Juga PW12 kata jangan ingat lagi adik-adik (dia) dan juga mengatakan makan dan tidur seperti biasa. PW12 juga kata dia akan jumpa saya di mahkamah. PW12 juga kata bahawa kedua-dua gambar adalah kepada saya. Dalam surat, PW12 juga mengatakan saya mesti berbaik dengan lain tahanan. PW12 memberi alamat yang mana dia PW12 boleh dihubungi. PW12 memberi alamat Periasamy, uncle kepada PW12. Nama penuh Periasamy adalah Periasamy a/l Kalimuthu. Dalam surat PW12 ada meminta maaf. Dalam surat PW12 juga kata dia sayang saya' (for that letter see D28, which was admitted without any admission by the prosecution of the facts asserted therein (see 139NP).

[32] Suffice it to say that the testimony of the accused was assiduously challenged by the prosecution. Anyway, under cross-examination, the accused affirmed as follows. He was the only adult in house 681 on 20 November 2004. The children were asleep when he got home at 2am on 20 November 2004. He hung his security guard uniform in that other room, not in the room shown in photograph P5(13). He slept in that other room, an adjourning room which was his room, and not in the same room as the children. When he woke up on

20 November 2004, he went straightaway to the room of the children (see 145NP). 'PW12 sahaja yang bunuhkan anak-anak' (see 146NP). He did not kill the children with a rope/string. 'Saya menangis depan anak-anak, bukan depan PW12. PW12 juga menangis dan kata 'bapak tolong saya, saya tersilap membuat sedemikian'. Saya kata, 'oleh kamu buat demikian biar saya mati'.' He denied that PW12 'tidak mampu membunuh tiga adik-adik.' He denied that he attempted suicide 'selepas rasa bersalah membunuh anak-anak', that he coaxed PW12 to commit suicide, that he attempted suicide in the room where the children were found (see 150NP), that he killed the children whilst they were asleep. He said that PW12 made those etchings on the door. On 18 November 2004, he reported to the Kulai Police Station that PW11 assaulted PW12. He agreed that he and PW12 were the only (living) persons in the house after the death of the children. He denied that because 'PW12 masih hidup, kamu kata PW12 yang bunuh'. He denied that he incriminated PW12 to save his own skin. On 24 November 2004, he told ASP Menon (PW13) that PW12 killed the children. He denied that the letter (D28) was not written by PW12.

[33] Under re-examination, the accused said that he did not sleep in the same room as PW12 'sudah capai umur dewasa'. He did not say 'mari kita mati bersama-sama'. The marks he saw on the neck of the children were not the same as in the photographs (see 166NP).

[34] Under further examination-in-chief, the accused related that he told PW13 (ASP Menon) that PW12 killed the children when he was at the Kulai Police Station, but that PW13 said to him that PW12 had given him (PW13) all information and that therefore he would not take a report from him (accused). Under further cross-examination, the accused denied that he first saw PW13 at Hospital Sultanah Aminah, Johor Bahru, and or that he was discharged from hospital on 25 November 2004.

[35] That the accused reported to the Kulai Police Station that PW11 assaulted PW12, and that the accused told PW13 on 24 November 2004 that PW12 killed the children, were raised only for the first time at the stage of the defence. Learned DPP applied for leave to adduce rebuttal evidence. Since those alleged facts could not have been foreseen by the prosecution, leave was granted to the prosecution to answer the evidence given ex improviso by the accused (for the law relating to leave to adduce rebuttal evidence, see *Public Prosecutor v Zulkifli Arshad* [2004] 2 CLJ 643). It was the testimony (see 174NP) of Inspector Champin Puih (PW15) who produced the pertinent volume of police reports (P30), that no report was ever lodged by the accused at the Kulai Police Station between 17 November 2004 and 22 November 2004, and it was the testimony (see 179NP) of PW13 that he did not meet the accused at the Kulai Police Station on 24 November 2004, that the accused was

in hospital from 20 November 2004 to 25 November 2004, and that the accused did not tell him that PW12 did it.

[36] The defence then applied and was granted leave to adduce evidence that the police report was in fact lodged at the Skudai Police Station. It was then the testimony of the accused (see 183NP) that he lodged the said police report at the Skudai Police Station on 19 November 2004 at 11am. The prosecution was again granted leave to adduce rebuttal evidence. It was the testimony (see 185NP) of Constable Mohd Paisal bin Muhmud (PW16) who produced the pertinent volume of police reports (P32), that no report was ever lodged by the accused at the Skudai Police Station on 19 November 2004.

[37] It is settled that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony (*Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212, 213, per Raja Azlan Shah CJ, as HRH then was) or 'tantamount to accepting the truth of the witness's testimony' (*Public Prosecutor v Mohd Amin Mohd Razali & Ors* [2002] 5 MLJ 406; [2002] 5 CLJ 281 per Zulkefli J, as he then was). The rule requiring a party's case to be expressly put to his opponent's material witnesses when they are under cross-examination applies to both criminal and civil trials (*Aik Ming (M) Sdn Bhd & ors v Chang Ching Chuen* [1995] 2 MLJ 770; [1995] 3 CLJ 639). It is not necessary to put the same question to all witnesses (*Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin* [2003] 2 MLJ 97; [2003] 2 CLJ 19). But where the opportunity to challenge the opponent's evidence is totally eschewed, then it must follow that unchallenged evidence cannot be disputed at all (*Browne v Dunn* (1893) 6 R 67).

[38] It was unchallenged evidence that the accused was still alive, albeit unconscious, at about 3.30pm. It was also unchallenged evidence that the accused and PW12 were found hanging in the room where the children were. That was the established evidence against which the defence must be evaluated.

[39] Briefly stated, it was the defence of the accused that he reached home at 2am on 20 November 2004 and that after the midnight meal, he had nothing to do with the room where the children were found, and hence, so it should follow, that he had nothing to do with the death of the children. The defence story was that the accused found the children already dead at 9am, and that the accused then proceeded to hang himself in the adjourning room on the upper floor. The effect of that story was that the accused proceeded to hang himself soon but not long after his discovery of the death of his children, all killed by PW12. But the hanging incident must have been around 3.30pm, or as said, the accused could not, surely not, have survived that long, until the time he was cut loose. Had the accused proceeded to hang himself at about 9am., or even hours later, but not at about 3.30pm, he could not have escaped his intended

fate. Given so, it would not appear that the accused would have discovered at 9am that the children had died. But if indeed the accused discovered at 9am that the children had died, then what transpired in the following six hours, from 9am to 3.30pm? As found at the close of the prosecution case, the hanging incident could not have been at about 9am.

[40] The other crucial aspect of the defence version of the hanging incident was totally incredulous. The defence story was that the accused proceeded to hang himself in the adjourning room, not in the room where the children were. In the first place, when the prosecution witnesses were being cross-examined, there was no notice that there would be such a defence. But even if that were not to be held against the accused, it would still not seem that the story of suicide in the adjourning room was even remotely plausible. The defence story was that the accused kicked away the chair, 'lepas itu tali saya sangkut leher saya. Saya nampak imej PW12. Saya ingat tali sangkut leher saya, dan pada masa itu PW12 pegang kaki saya. Saya tidak tahu apa yang berlaku selepas itu. Saya sedar diri empat hari kemudian, di wad hospital' (see 137NP). It was established evidence that the accused was found hanging in the same room as where the children were. It was also established evidence that the only living persons in house 681 after the children had died were the accused and PW12. Now if indeed the accused had hang himself in the adjourning room and knew nothing thereafter, meaning that he had passed out, then it must follow that PW12 had lowered the accused from the ceiling of the adjourning room and then hoisted the accused up to the ceiling of the room where the children were, because that was where the accused was found. Would it have been possible for a child of 14 to have done that? It would definitely not seem so. The story that the accused attempted suicide in the adjourning room was not plausible. The entire defence version of the hanging incident, both as to the time and place, was implausible. Incidentally, the story that the accused was at work on 19 November 2004 was contradicted by PW10 (Chander a/l CK Nair, from the security firm where the accused was employed) who testified that on 19 November 2004 the accused was not at work (see 68NP).

[41] The rest of the story of the accused also failed to stand up to scrutiny. It was the testimony of the accused that PW12 was ill-treated by PW11 ('Saya tanyakan PW12 mengapa dia buat begitu. PW12 jawab sebab Krishnama hanya jaga anak-anak sendiri, tidak menjaga beliau. Kemudian saya beritahu PW12 saya sedia mati kerana perbuatan PW12'), which ill-treatment was advanced as the reason for PW12 to take it out on the children. To that end, it was the testimony of the accused that he lodged a report, either at the Kulai or Skudai Police Station on 19 November 2004, that PW11 assaulted PW12 on 19 November 2004. But it was the testimony of PW15 and PW16 who produced the pertinent volumes containing the police reports, that the accused had not lodged the alleged report. There was no truth that the accused had

lodged the alleged report. It was the testimony of the accused that at the Kulai Police Station on 24 November 2004, he told PW13 that it was PW12 who did it. But it was the testimony of PW13, who had no reason to lie and there was no reason to disbelieve him (PW13), that the accused was in hospital on 24 November 2004, and that the accused had not said to him that it was PW12 who did it. Now if the accused were that disposed on 24 November 2004 to incriminate PW12, then how could it account for the unchallenged fact that the accused was totally silent and reticent on the subject of the death of his children, whilst he was under observation at Hospital Permai? It would not add up that the accused could have told PW13 that it was PW12 who did it.

[42] It was the testimony of the accused that he saw the etchings on the door in the following context.

> Lepas makan, anak tidur, dan saya tidur di bilik berlainan. Saya bangun dari tidur pada 9.00 pagi. Saya masuk ke bilik anak-anak dan nampak tiga orang anak telah meninggal. Saya ada juga nampak buih di mulut Harini. PW12 peluk kaki sambil menangis dan memberitahu saya dia yang buat' (see 132NP). PW12 told him that she used a raffia string to kill the children, 'kerana Krishnama'. PW12 said she had no intention to kill the children. He pulled PW12 out of the room. Then he saw the etchings on the door. He asked what were they and who had made them. 'Saya diberitahu tulisan adalah nama Krishnama dan nombor telefon Krishnama dan juga ayat bermaksud 'Krishnama adalah punca kematian kami semua'. Saya tanyakan PW12 mengapa dia buat begitu. PW12 jawab sebab Krishnama hanya jaga anak-anak sendiri, tidak menjaga beliau. Kemudian saya beritahu PW12 saya sedia mati kerana perbuatan PW12.

[43] As such, it was the testimony of the accused that he saw the etchings before there was any proclivity to commit suicide. In any event, the effect of the testimony of the accused was that the etchings were already there before he entered the room where the children were. But it was the testimony of the accused that he knew nothing before he entered the room and only decided to commit suicide after he found out about what had happened to his children. Logically, a suicide note, if any, only comes into mind after the decision has been made to commit suicide. It cannot be the other way around. The etchings on the door must have been done after a decision had been made to commit suicide. It was denied by the accused that he coaxed PW12 to jointly commit suicide. The testimony of the accused was that PW12 asked for his help — 'PW12 terus menangis dan meminta tolong' (see 132NP). Indeed, there was no testimony from the accused that PW12 had decided on suicide at that point in time. Hence, those etchings could not have been done by PW12, for she could not have had, as yet, the intention to commit suicide at that point in time. Those etchings on the door could only have been made after the accused had decided to commit suicide, which could only mean that those etchings could not have been there when the accused entered the room.

[44] There was no possibility of any residual truth in the story of the accused. Now if it were to be further taken into account that there was no notice of that implausible defence, then it could only be said that the defence was not only implausible but was a recent invention. The bare assertion that PW12 did it was a recent invention. PW12 could not have done it. And even if she could, there was no reason at all for PW12 to have done it. The letter that PW12 sent to the accused was not any confession of guilt. Rather, it was a letter from a daughter to her father, to console and to offer some solace to him. That was all that was to it. It was so clear that only the accused had the motive and only the accused could have done it.

[45] The evidence was considered in totality. But at the end of the entire case, there was no doubt that the accused was guilty as charged. On that, there was no basis for any doubt. For the above reasons, the accused was convicted of the (amended) charges and sentenced to be hung by the neck until he is dead.

Accused convicted of murder and sentenced to death.

Reported by Kohila Nesan